Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

October Term, 1997

DAVID A. PETERSON,

Petitioner,

vs.

DOMINIC P. GENTILE AND HIS MARITAL COMMUNITY AND THE LAW FIRM OF GENTILE PORTER AND KELESIS, DOE JOHN, UNKNOWN AND UNNAMED LEGAL MALPRACTICE INSURERS AKA THE HOME INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. Does a judge hearing a case brought by a pro-se plaintiff against a defendant attorney (attorney malpractice) have an obligation or duty to instruct the pro se plaintiff of his need to depose an expert witness if he feels expert testimony is necessary in order for the pro se plaintiff to proceed in his court?

2. When it is charged, and evidence is presented that an attorney has lied in his withdrawal letter to the Court and further that he has accepted monies from opposition counsel to compromise his client's claims and interests is this conduct obvious malpractice?

3. Once a pro-se plaintiff has established issues of liability and damages to the satisfaction of an Appellate Court is it an abuse of discretion for the District Court to allow a defendant attorney to shield himself behind the issue of expert testimony without first notifying or allowing a pro-se plaintiff an opportunity to comply with this requirement?

4. Is the allowing of a defendant attorney and his counsel to use as their only argument for defense that of the need for expert testimony in a case of simple and blatant fiduciary breach an abuse of discretion on the part of the Court?

5. Is the legal profession acting as a closed forum in its protection of fellow members accused of wrong doing in its abuse of the expert testimony requirement and does this abuse of the requirement place otherwise guilty attorney's above the law?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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JURISDICTION

United States Court of Appeals for the Ninth Circuit - Order March 18, 1998

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

It is the Petitioner's belief that the United States Court of Appeals for the Ninth Circuit has sanctioned a decision by the United States District Court of Nevada which denied the petitioner due process and access to the Court system through the abuse of the Expert Testimony Requirement.

It is the Petitioner's belief that the legal profession in its abuse of this use of the Expert Testimony Requirement is acting as a closed forum placing otherwise guilty attorney's above the law. In requiring a member of this forum to testify against a fellow member of this forum in order to establish liability in legal malpractice cases, the scenario is always set for unfair advantage to the members of this forum.

It is the Petitioner's belief that the Court's supervision is needed to set threshold requirements of conduct in legal malpractice actions which do not require expert testimony, in order to protect access to the judicial system to those outside this forum seeking justice from a member of this forum.

It is the Petitioner's belief that any pro-se plaintiff who approaches the court system seeking to sue an attorney be advised in writing by the court at the outset of his action of the need to provide expert testimony to proceed with his suit. To deny this information to the pro-se plaintiff acting in good faith only to be ambushed by this codicil unwritten in the statutes, and unknown by the pro-se litigant, is to close the doors of justice to the litigant and deny due process.

STATEMENT OF THE CASE

This appeal follows the Entry of Order on March 18, 1998 by the United States Court of Appeals for the Ninth District denying plaintiff's petition for rehearing of Defendant's Second Motion for Summary Judgment in a Diversity Case based on legal malpractice.

The underlying civil rights action that led to this legal malpractice action resulted from the plaintiff's desire to sue for damages and to clear his name after being falsely accused by a corrupt police officer who falsified evidence in order to protect himself after the plaintiff, who met him through a friend, tried to expose his corruption.

Holly Harrell-Peterson, the plaintiff's wife, was pregnant with the marriage's first child while Peterson v. Nevada was in progress. Holly was severely distressed by the ongoing event. Despite the finest prenatal care and a reportedly healthy fetus, Holly suffered a stillbirth in the ninth month of her pregnancy. Holly's physician stated that she believed the stress Holly suffered as a result of the legal troubles caused the subsequent stillbirth.

On May 16, 1990 the plaintiff met with Dominic Gentile, the defendant attorney in this action. It was the plaintiff's desire to recover damages for the wrongful death of his first child, business losses, and expose corruption within the City police force.

At the initial meeting Gentile requested a twenty thousand dollar retainer and told the plaintiff that the case had a seven digit potential. He described the case, because of the evidence on hand, as a "cakewalk."

On November 23, 1991, the trial drawing near, the plaintiff attended a settlement conference. Dominic Gentile's demeanor and an overheard conversation led the plaintiff to realize that his attorney had breached his fiduciary duty, and

had compromised his case. After investigating, the plaintiff found that his then attorney (now defendant) had accepted five checks each in the amount of seventy five hundred dollars from opposition counsel. The plaintiff questioned Gentile, who then asked the plaintiff to sign a conflict of interest waiver, this three weeks before the trial. The plaintiff was unable to immediately sign the waiver as he was moving to Utah, but unfamiliar with the law was willing to do so.

An assistant to Gentile called the plaintiff on December 15, 1991 in Utah to inform the plaintiff that Gentile had written a letter of withdrawal to the Court and had informed opposition counsel that he was no longer his attorney. The Letter of Withdrawal to the Court was defamatory and inflammatory about the plaintiff including statements about alleged mental illness as perceived by Gentile. Unable to find counsel at that late date, the plaintiff was forced, without counsel, to settle the matter. The plaintiff did so with great reluctance but felt he had no choice in the matter. It is worthy to note that the officer whom the plaintiff was suing was convicted in 1992 of felony charges related to the taped beating of a man so violent it could not be shown on local news programs. It too, is worthy of note that counsel for Gentile in this action also represents the City of Las Vegas and the Police Department.

In December of 1993, the plaintiff, unable to rationalize or find peace of mind over the events that had so changed his life including and especially the death of his daughter, unable to find an attorney, decided to file pro-se a suit against Gentile, an attorney whom the plaintiff had trusted to put his life in order who had instead left it in shambles.

The plaintiff conducted discovery and took eleven depositions in order to prove to a certainty that line for line, word for word, the defendant Gentile's withdrawal letter to the Court was perjurious and false. Further, the plaintiff in a

motion to compel received a copy of one of the five checks written to Gentile from opposition counsel during the time frame Gentile represented the now plaintiff. Both the defendant's counsel and deposed opposition counsel of the former matter admitted the transaction took place. Opposition counsel's explanation for the transfer of funds was that after a three state search, one of the other two members of Gentile's firm was most qualified to handle a personal tax matter, in spite of the fact that this "tax expert" at the time the deposition was taken was advertising his practice in the phone book as a personal injury attorney specializing in auto accidents, divorce, child custody, and dog bites with no mention of tax expertise.

Armed with overwhelming evidence including a six hour deposition of the defendant Gentile that included over twenty perjurious statements, the plaintiff was prepared for trial.

The defendant's counsel filed a Summary Judgment Motion October 24, 1994 to which the plaintiff responded. After waiting seven months for an answer from the Court and after talking to the Clerk of Courts in Nevada, the plaintiff called the Secretary of the Judge hearing the motion. The Secretary informed the plaintiff quite curtly that the Motion had been misplaced.

On June 6, 1995 the plaintiff received a blind remittal informing the plaintiff that another judge was to hear the case and that he was the neighbor of defendant's counsel. The plaintiff signed the blind remittal in the affirmative anxious to go to court.

In early August of 1995 the plaintiff learned that the defendant's counsel had hired the son of the judge during the time frame plaintiff's Motion for Summary Judgment was under consideration by that Judge. It concerned the plaintiff that defendant's counsel seemed closely associated with both judges hearing the Summary Judgment Motion.

In early September the plaintiff called the Chambers of the Judge now hearing the case in order to establish that they had received the Motion and that it was not lost. The plaintiff inquired as to the status of the Peterson v. Gentile case. The Secretary mistakenly thinking the plaintiff was calling from defendant's counsel's office cheerfully offered that they would "have it knocked out in about two weeks for you guys." Confused the plaintiff identified himself only to be offered the stammering that he should take a settlement. Quite flustered the secretary hung up on the plaintiff. The plaintiff was shocked, startled, and unsurprised when on September 18, 1995 the Judge ruling on the Summary Judgment ruled for the defendant.

The plaintiff appealed the ruling of the Court to the United States Court of Appeals for the Ninth Circuit. This court reversed in part the District Court's decision on the issue of damages.

The defendant's counsel entered a second summary judgement motion so identical in nature that the plaintiff failed to recognize it as a new pleading. When informed by the Court of his deficiency, the plaintiff responded to the second summary judgement motion by the defendants.

On February 18, 1997 the Judge granted the defendant's Summary Judgement Motion, the plaintiff filed a second appeal to the Ninth Circuit Court of Appeals on March 3, 1997. On November 6, 1997, the Court affirmed the defendant's Motion. The plaintiff then filed a Petition for Rehearing (Appendix B) which was denied by a vote to two to one on March 18, 1998.

REASONS FOR GRANTING THE WRIT

Firstly, the Petitioner here would say that it is of paramount importance to the public whom this petitioner reluctantly by circumstances represents that there be regulation of misconduct by attorneys who, for monetary gain or other reasons, blatantly betray the clients they represent. The petitioner believes he speaks for the interests of the public when he says that the present system of self or in-house discipline is unacceptable and woefully deficient. If any other profession or business concern were to operate without accountability to the public or fear of discipline, the outcry would be deafening. In the interest of the public good, it is time for the court to establish threshold requirements for legal malpractice which do not require affirmation by fellow attorneys or former fellow attorneys - judges.

The petitioner assuredly has not been the first to be betrayed by an attorney, and most assuredly, under the present disciplinary system, with its vague ethical rules unusable by the petitioner and the public and the inherent reluctance by those inside the legal community to even broach the subject, he will not be the last. This all is exacerbated by the fact that those most competent practicing attorneys in the field of malpractice are retained by the huge malpractice insurance companies, and a majority of those who could do battle with these large insurance companies are insured by them. The petitioner believes this monopoly should not be allowed to continue, as it serves well neither those of ethics in the legal profession nor the public interests. The public's access to the Court System as it pertains to legal malpractice is now left to the whim of its judges. There is no law that directs a judge who, after all is said and done, aside from his proximity to those he must judge, those whom he knows or enjoys a working relationship with, hear a malpractice action. The

attendant proximity, familiarity and common cause, must be perceived by this Court to be an environment that cannot fairly and impartially serve best the law and the public.

If there is one irrefutable reason the Court must hear this case it is that only one such as the petitioner, a pro-se litigant, someone outside this closed forum, is likely to beg this court to establish law that would promote ethical conduct, accessibility to the court room in malpractice cases and ask for accountability and definitive discipline to those in the legal community who betray the trust they are given.

That having been said, the petitioner would state that he feels his case represents a microcosm of all of the abuses visited on a client by an attorney acting deliberately in bad faith and should be heard by this Court. In the petitioner's first Summary Judgment Brief, the petitioner pointed out to the Court that the defendant attorney "was provably by evidence in violation of all or parts of Rules 151, 152, 153, 154, 155, 156, 157, 160, 166, 171, 172, 173, and 182" of Professional Conduct. This seemed to matter not at all to the Court. The petitioner offered concrete evidence that the Defendant had not only perjured himself in his withdrawal letter to the Court, but had perjured himself numerous times in his six hour deposition. The petitioner offered evidence that the defendant attorney had to a certainty accepted monies from opposition counsel to compromise his interests.

The petitioner, once he filed his malpractice action, was badgered and bullied. Defendant's counsel interfered with his witnesses, failed to produce one key witness they told the plaintiff they would produce without subpoena, forced the plaintiff to file Motions to Compel in order to obtain checks necessary to the case, and fined the plaintiff for producing interrogatives that were untimely, only to be told after four years and tens of thousands of dollars of expenses that all was in vain because he had failed during the Discovery Process to

depose an expert witness - a fellow member of the Bar. The petitioner has taken eleven depositions and would gladly have taken another had he known or been advised of this requirement. At no time during the Discovery Process or at anytime prior to the Court's Ruling that the Defendant's conduct was not obvious was the plaintiff given instructions or offered any opportunity to correct his deficiency.

The petitioner believes that it should have been obvious to the Court hearing this matter as it should be obvious to the Court to which the petitioner now appeals that betrayal and accepting twenty pieces of silver are concepts much older than the American Judicial System and most assuredly are concepts lay person's can reasonably perceive and comprehend without the use of expert testimony.

CONCLUSION

The petitioner asks the Court in the interests of those who have been and will continue to be abused through the improper application by the legal profession of the Expert Testimony Requirement to allow the much disdained pro-se litigant an opportunity to speak before it and to hear his case.

Dated: August 18, 1998

Respectfully submitted,

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Pro-se Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID ALAN PETERSON, CV-S-93-1037-DWH

Plaintiff,

vs. **ORDER**

DOMINIC P. GENTILE, et al.,

Defendants.

_____/

STATEMENT OF CASE

Defendant Dominic Gentile was plaintiff's attorney in a civil rights action which plaintiff brought against the Las Vegas police Department and Officer James Campbell. Plaintiff sues Gentile and the law firm of Gentile, Porter & Kelesis for: 1) breach of contract; 2) tortious breach of contract; 3) legal malpractice; 4) breach of covenant of good faith, fair dealings and fiduciary duties; 5) negligence; 6) negligence *per se;* and 7) intentional infliction of emotional distress.

Defendants move for summary judgment (#27). An opposition (#29) and reply brief (#30) have been filed and the motion has been submitted for decision. Also submitted is plaintiff's motion for a jury trial (#31) which defendants oppose (#32).

BACKGROUND

In February, 1986 a jury convicted plaintiff of giving away a controlled substance and offering to sell a controlled substance to Campbell, an undercover officer with the Las Vegas Police Department. Plaintiff's conviction was reversed by the Nevada Supreme Court on appeal on the ground that improper hearsay evidence had been admitted at trial. The case was remanded for a new trial but never retried.

In July, 1989, plaintiff filed a civil rights suit against the Las Vegas Police Department and Campbell alleging claims including wrongful arrest, false imprisonment, and malicious prosecution. Plaintiff's civil rights suit alleged Campbell had fabricated the criminal charges against plaintiff because of Campbell's jealousy of plaintiff and his "uncontrollable desire" for a criminal conviction.

Prior to his criminal trial, Plaintiff's then wife gave birth to a stillborn child. Plaintiff attributes the stillbirth to the stress suffered by his wife during this period and hoped to recover damages including the stillbirth in his civil rights action.

Initially, plaintiff was represented in his civil rights action by another attorney. Defendant Gentile substituted in as attorney of record on June 15, 1990, after entering a contract for professional services with plaintiff on June 8, 1990. The contract entered between Plaintiff and Gentile provided that Gentile and an associate would handle plaintiff's civil rights case on a contingency basis and that plaintiff would give Gentile a $15,000 non-refundable retainer and also be responsible for costs ($5,000 was advanced to Gentile for this purpose).

On November 26, 1991, the defendants in plaintiff's civil rights suit served an offer of judgment in the amount of $40,000 which according to defendants, plaintiff refused to sign.

On December 13, 1991, Gentile filed a motion to withdraw. At that time, the trial in plaintiff's civil rights action was on the court's December 2, 1991 stack. Gentile also filed a sealed affidavit in which he explained the reasons he sought withdrawal.[1] At the same time, Gentile sent a letter to plaintiff with a copy of his motion to withdraw, advising him that he sought to withdraw and enclosing a check for $7,256.50. Plaintiff was later called by defendants and told payment was being stopped on the check because of an accounting error and a new check for a corrected amount would be issued. Defendants then sent a new check to plaintiff for $386.91 which defendants assert represented the unused portion of the $5,000 plaintiff had advanced for costs.

On December 31, 1991 Magistrate Judge Leavitt granted Gentile's motion for withdrawal, gave plaintiff until January 31, 1992 to find new counsel, and set a status conference for February 3, 1992.

In February, 1992, Gentile arranged a meeting between plaintiff, Cal Potter, a Las Vegas attorney, and himself, regarding the possibility of Potter taking plaintiff's case. Plaintiff declined Potter's representation and proceeded with his civil rights action *pro se*.

Plaintiff settled his civil rights suit for $75,000 and dismissed his complaint against the Las Vegas police department and Campbell on April 7, 1992.

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[1] The reasons stated by defendant were that plaintiff withheld the names of witnesses; had an "obsessively vindictive attitude toward defendants;" failed to negotiate a settlement in good faith; and refused to sign an acknowledgment of defendants' offer of judgment. Plaintiff disputes the truth of these statements.

DISCUSSION

I. Standard Of Review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 9th Cir. 1982)

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986)

> [T] here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id., 477 U.S. at 249-50 (citations omitted). Moreover, if the factual context makes the nonmoving party's claim

implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988)

II. Claims of Legal Malpractice and Breach of Professional Duties

"In Nevada, legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of the client's damages." *Semenza v. Nevada Medical Liab. Ins. Co.*, 104 Nev. 666, 667-68 (1988).

Defendants argue summary judgment should be granted on plaintiff's malpractice claims because plaintiff has introduced no evidence that defendants breached the applicable standard of care and no evidence that plaintiff sustained any damages from the alleged wrongful acts of the defendants.

A. Damages

To prevail in a legal malpractice suit, a plaintiff must prove not only negligence by the lawyer but also damages caused by the lawyer's negligence. See, *Semenza*, 104 Nev. at 668; *Warmbrodt v. Blanchard*, 100 Nev. 703, 706-07 (1984) (where damage has not been sustained, a legal malpractice action should be dismissed); *Boulder City v. Miles*, 85 Nev. 46, 49 (1969) ("no one has a claim against another without having incurred damages").

While plaintiff makes numerous allegations of negligence and breach of professional duty, he offers no evidence, expert

or otherwise, to establish that but for the alleged negligence, his recovery in his civil rights action would have been greater. At most, in his opposition brief, plaintiff provides numerous citations to cases where greater amounts were awarded. However, these examples are not evidence that but for defendants' alleged negligence and breach of duty, a greater amount would have been recovered in this case.

Plaintiff ultimately settled his civil rights action *pro se* for $75,000. This amount is consistent with both defendant Gentile's evaluation of the case before he withdrew[2] and within the ballpark of Craig Barlow's evaluation of the case.[3]

Plaintiff introduces no evidence that the case would have settled for more absent any alleged breach of duty or negligence by defendants. While this court construes *pro se* papers liberally, it cannot ignore plaintiff's failure to produce any evidence to establish any damages resulting from the alleged acts and/or omissions of defendants. Accordingly, summary judgment on plaintiff's claims relating to legal malpractice and breach of professional duties must be granted. These include plaintiff's first, third, fourth, fifth and sixth causes of action.

B. Standard of Care

Plaintiff has made general allegations outlining some twenty-six charges of negligence and breach of duty by defendant Gentile. Defendants argue plaintiff cannot show a

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[2] On September 23, 1991, Gentile prepared a confidential settlement conference statement in plaintiff's civil rights case which noted: "Counsel has . . . advised client that an appropriate settlement proposal to stop litigation at this stage should be in the amount of $75,000."

[3] Craig Barlow is an attorney with whom plaintiff consulted after defendant Gentile's withdrawal. He stated in his deposition that he thought the case was worth in a range of between $25,000 to something over $100,000.

breach in the standard of care for several reasons. First, they argue expert testimony is required to establish a deviation from the standard of care in a legal malpractice action.[4] Second they argue plaintiff's allegations that defendants breached certain rules of ethics, even if accepted as true, do not establish a breach of the standard of care. Finally they argue plaintiff's allegations that defendant Gentile did not follow plaintiff's instructions, even if accepted as true, do not establish a breach.

As discussed above, defendants' motion for summary judgment is granted on the ground that even assuming a breach of duty or negligence by defendants, plaintiff has introduced no evidence that any alleged negligence caused him damages. Therefore, this court does not reach the issue of whether an issue of material fact has been raised as to whether defendants were negligent or breached a standard of care.

III. Intentional Infliction of Emotional Distress

"To recover for the intentional infliction of emotional distress, a plaintiff must establish the following elements: (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant either intended or recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately caused the distress." *Nelson v. City of Las Vegas,* 99 Nev. 548, 555 (1983)

Plaintiff has introduced no evidence he suffered severe or extreme emotional distress caused by defendants' conduct. Therefore, defendants' motion for summary judgment is granted on this cause of action.

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[4] The Nevada Supreme Court has not yet addressed this issue.

IV. Refund of Retainer and Advance for Fees

Plaintiff claims defendants are in breach of contract for failing to return the retainer and/or fees advanced in his civil rights suit. It is undisputed that plaintiff advanced defendant Gentile $20,000 when he was first retained in plaintiff's civil rights suit. It is also undisputed that defendants sent plaintiff a check for $386.91 which defendants claim represented the remaining balance in plaintiff's trust account. Defendants also sent plaintiff a statement itemizing the amounts deducted.

Plaintiff claims defendants should have returned "a substantial part of advance payment of fee that was not earned." However, plaintiff does not dispute any specific items deducted by defendants nor does plaintiff submit any evidence to support his claim that the $386.91 amount was incorrect. Accordingly, summary judgment is granted for defendants on this claim.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment (#27) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for a jury trial (#31) is DENIED as moot.

The Clerk of Court shall enter judgment accordingly.

DATED: This 12th of September, 1995.

/s/
DAVID W. HAGEN
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ALAN PETERSON,	)	No. 95-17026
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-93-01037-DWH
v.	)	
	)	
DOMINIC P. GENTILE, and his marital community and the Law Firm of Gentile, Porter & Zelesis; DOE, JOHN, unknown and unnamed legal malpractice insurer(s),	)	MEMORANDUM*
	)	
	)	
	)	
	)	
	)	
Defendants-Appellees.		

Appeal from the Unites States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding
Submitted May 20, 1996**

Before: BROWNING, REINHARDT, and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

David Allen Peterson appeals *pro se* the district court's summary judgment in his diversity action for legal malpractice. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

We review a district court's summary judgment de novo. See Damron v. Herzog, 67 F.3d 211, 213 (9th Cir. 1995), cert. denied, 116 5. Ct. 922 (1996). Viewing evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact. Id.

Peterson contends that the district court erred by holding that he failed to produce evidence to establish any damages resulting from the alleged misconduct of his former counsel Dominic P. Gentile and his law firm ("Gentile"). We agree. Assuming Gentile's liability as did the district court, we reverse the district court's summary judgment on this issue because there is a genuine issue of material fact as to the amount of damages. See id.

Peterson also contends that the district court erred by finding that he failed to present a genuine issue of material fact as to his intentional infliction of mental distress claim. This contention lacks merit because Peterson did not allege facts indicating that Gentile acted recklessly in his representation of Peterson, nor did Peterson show any evidence of extreme emotional distress. See Nelson v. City of Las Vegas, 665 P.2d 1141, 1145 (Nev. 1983) (per curiam). Therefore, the district court properly entered summary judgment on this claim. See Damron, 67 F.3d at 213; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (holding that summary judgment is required against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case").

Peterson's contention that he was entitled to a refund of costs he had advanced to Gentile also fails. Gentile produced an itemized billing statement and a copy of a check made to

Peterson representing the remaining balance in Peterson's trust account. Peterson did not set forth specific facts to refute any itemized charges. See Damron, 67 F.3d 211; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (stating to survive summary judgment, non-moving party must set forth specific facts there is a genuine issue for trial).[1]

Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

[1] Peterson contends that the district court did not apply a liberal standard in reviewing his complaint. The record does not support this contention.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ALAN PETERSON,	)	No. 95-17026
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-93-01037-DWH
v.	)	Nevada (Las Vegas)
	)	
DOMINIC P. GENTILE, and his marital community and the Law Firm of Gentile, Porter & Kelesis; DOE, JOHN, unknown and unnamed legal malpractice insurer(s),	)	ORDER
	)	
Defendants Appellees	)	

Before: BROWNING, REINHARDT, and FERNANDEZ, Circuit Judges.

The court, on its own motion, recalls the mandate issued on October 9, 1996, and amends the memorandum opinion filed on May 29, 1996 by deleting the last sentence of paragraph three, which reads, "Assuming Gentile's liability as did the district court, we reverse the district court's summary judgment on this issue because there is a genuine issue of material fact as to the amount of damages. See id.," and replacing it with the following:

> Assuming Gentile's liability, as did the district court, we reverse the district court's summary judgment on this issue. See id. Peterson has presented evidence sufficient to raise a genuine issue of material facts the amount of

damages. That evidence includes a letter from Gentile to defendants' attorney valuing the case at $6,608,700 and demanding a settlement of $1,000,000, Gentile's statement in his motion to withdraw that Peterson had suffered $125,000 in damages, and another attorney's estimate of recovery with a high end of $100,000.

The mandate shall be issued forthwith.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID ALAN PETERSON, CV-S-93-1037-DWH (RLH)

Plaintiff,

vs. **MEMORANDUM DECISION AND ORDER**

DOMINIC P. GENTILE, ESQ., et al.,

Defendants.

_____/

Before the court is plaintiff's motion (#55) for jury trial. For the reasons set forth below, plaintiff's motion is denied.

Plaintiff filed this action October 21, 1993. The complaint did not make a jury demand; in fact, plaintiff did not request a jury until December 23, 1994 (#31). In his motion (#31), plaintiff admitted that he had "not properly complied with Rule 38 of the Federal Rules of Civil Procedure" and that he had "neglected" to demand a jury, and requested the court exercise its "discretionary power to order a trial by jury in the instant action." At the time of that request, discovery had been closed for three months.

In September 12, 1995, memorandum decision and order, the court granted summary judgment in favor of defendant (#36). Plaintiff's motion for a jury trial was denied as moot, as the entire action was disposed of by the court's order. This case is now before the court on remand from the Ninth Circuit Court of Appeals, and plaintiff has renewed his motion for a jury trial (#55).

Federal Rule of Civil Procedure 38(d) provides that failure to file a demand for jury trial within the time specified within that rule, ("not later than 10 days after service of the last pleading[1] directed to [the issue to be tried]") constitutes a waiver of trial by jury. Rule 39(b) allows the court, in its discretion, to order a jury trial on a motion by a party who has not filed a demand for one. The discretion allowed by Rule 39(b) is narrowly construed by the Ninth Circuit, however; it does not permit the court to grant relief where the failure to make a timely demand results from mere inadvertence or oversight. *See, e.g., Lewis v. Time Incorporated,* 710 F.2d 549, 556-57 (9th Cir. 1983); *Beckham v. Safeco Ins. Co.,* 691 F.2d 898, 905 (9th Cir. 1982).

Plaintiff has not presented the court with any evidence or argument which takes this case outside of the "mere oversight" cases cited by defendant. This court does not have the authority to grant a jury trial at this late date. Plaintiff's motion (#55) is denied.

IT IS ORDERED that plaintiff's motion (#55) for jury trial is DENIED.

DATED: This 12th of December, 1996.

/s/
UNITED STATES DISTRICT JUDGE

[1] The "last pleading" was defendants' answer filed and served on January 19, 1994.

DISTRICT OF NEVADA
UNITED STATES DISTRICT COURT

DAVID ALAN PETERSON,

CV-S -93-1037-DWH

vs. MINUTES OF THE COURT

DOMINIC GENTILE, ET AL., December 20, 1996

Defendants.

_____/

PRESENT: HONORABLE DAVID W. HAGEN,
U.S. DISTRICT JUDGE
Deputy Clerk: Bonnie Hampton
Reporter: NONE APPEARING
Counsel for Plaintiff(s): NONE APPEARING
Counsel for Defendant(s): NONE APPEARING

MINUTE ORDER IN CHAMBERS:

Defendants have moved (#58) for summary judgment. The following notice is provided to plaintiff pursuant to the requirements of Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), and Arreola v. Mangaong, 65 F.3d 801, 802 (9th Cir. 1995).

Defendants have filed a motion (#58) for summary judgment and you must file points and authorities opposing a motion for summary judgment within fifteen days of service of that motion or within any extension of time granted by the court. See Local Rule 7-2 (b). The standards governing motions for summary judgment are stated in Rule 56 of the Federal Rules of Civil Procedure. You should read that rule and be familiar with it.

In particular, you should be familiar with Rule 56(e), which explains what you must do to properly oppose a motion for summary judgment. In opposing a motion for summary judgment, you cannot rely upon the allegations or statements in your complaint. Instead, you must submit evidence that responds to the motion and supports your opposition. This evidence can be in the form of affidavits, declarations, depositions, answers to interrogatories, admissions, or any other evidence you have that supports your opposition and responds to the evidence submitted by defendants with their motion.

If you fail to oppose the motion, or if you fail to submit evidence supporting your opposition, and if the motion for summary judgment has merit, your failure to file points and authorities in response to the motion shall constitute a consent to the granting of the motion. See, Local Rule 7-2(d). The court may then grant the motion because you consented and enter judgment against you. See, Local Rule 7-2(d).

IT IS THEREFORE ORDERED that plaintiff shall have to and including January 6, 1997, in which to oppose the pending dispositive motion pursuant to the instructions herein. Defendants shall thereafter have eleven (11) days in which to reply. If plaintiff fails to oppose, then the pending motion shall be submitted for decision. Plaintiff is further advised that barring the showing of extreme good cause, no further extensions shall be granted.

LANCE S. WILSON, CLERK

By_____
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID ALAN PETERSON, CV-S-93 -1037-DWH (RLH)

Plaintiff,

vs. **MEMORANDUM DECISION AND ORDER**

DOMINIC P. GENTILE, ESQ., et al.,

Defendants.

_____/

Before the court is plaintiff's motion (#68) in support of reversal of the court's denial of plaintiff's demand for a jury trial, plaintiff's motion for disqualification (#68), and defendant's renewed motion (58) for summary judgment. The court construes plaintiff's filing as a motion for reconsideration and also a motion for disqualification, and for the reasons set forth below, plaintiff's motions are denied. Defendant's motion for summary judgment, opposed at docket #69[1], is granted.

Plaintiff's Motion For Reconsideration

Plaintiff filed an untimely motion for a jury trial. He admitted he failed to comply with the jury trial demand provisions of the FRCP, but moved the court to grant a jury trial "in its discretion." The discretion allowed by Rule 39(b)

[1] Plaintiff has not requested oral argument. *See* #69.

is narrowly construed by the Ninth Circuit, however; it does not permit the court to grant relief where the failure to make a timely demand results from mere inadvertence or oversight. *See, e.g., Lewis v. Time Incorporated,* 710 F.2d 549, S56-57 (9th Cir. 1983); *Beckham v. Safeco Ins. Co.,* 691 F.2d 898, 905 (9th Cir. 1982). Plaintiff did not present the court with any evidence or argument taking this case outside of the "mere oversight" cases cited by defendant. Therefore, the court determined that it lacked authority to grant a jury trial and denied the motion.

Reconsideration of the court's order may be appropriate if the court committed clear error, if the initial decision was manifestly unjust, or if there is an intervening change in controlling law. *See School Dist. No. IJ, Multnomah County v. ACandS, Inc.,* 5 F.3d 1255 (9th Cir. 1993). *See also* FRCP 60(b). The court has reviewed the authorities cited by defendant and the arguments of both parties, and concludes that reconsideration is not warranted here. Plaintiff's motion for reconsideration is hereby denied.

Motion for Disqualification

Plaintiff, in his motion for reconsideration, attempts to create an issue regarding a blind remittal issued by the court many months ago. The court construes this argument in plaintiff's motion for reconsideration as a separate motion for disqualification. Such a motion must be made pursuant to either 28 U.S.C. §144 or 455(a) and (b). A motion made pursuant to §144 requires a party to submit an "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice..." 28 U.S.C. 144. The affidavit must state facts and reasons for the applicant's belief and must be accompanied by a certification that such affidavit is made in good faith. *Id.* When a motion is properly made and supported under §144, that motion must be heard

by another judge. Here, plaintiff submits no affidavit in support of his "motion", and therefore it is not a motion for disqualification made pursuant to §144 requiring a hearing before a different judge.

Section 455(a) allows a motion for disqualification where the judge's impartiality might reasonably be questioned. 28 U.S.C. 455(a). This court, in an abundance of caution, previously issued the blind remittal based on Mr. Renshaw's residential proximity. The remittal form placed the parties on notice that Mr. Renshaw, an attorney with the firm representing defendant, is Judge Hagen's neighbor[2]. Even if this lone fact would cause a reasonable person to doubt the court's impartiality, the court's disclosure was complete and on the record. The disclosure was made to give the parties the opportunity to have this matter heard by another judge. Pursuant to the remittal form, plaintiff could have anonymously disqualified Judge Hagen. Plaintiff waived this opportunity; therefore, to the extent plaintiff moves, pursuant to §455(a), for disqualification based on these facts, that motion is denied.

Section 455(b) requires disqualification where the judge has a personal bias or prejudice against a party, is connected with the case, the parties or their attorneys, has a financial interest in the case, or has personal knowledge of disputed evidentiary facts. 28 U.S.C. 455(b). This court has, as it does in every case before it, previously evaluated all of the foregoing grounds for disqualification and concluded that

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[2] Plaintiff also attempts to create an issue regarding the alleged employment of Judge George's son with the law firm representing defendant. Even where a judge's son is employed by a party, that fact is insufficient to mandate disqualification. *Datagate, Inc. v. Hewlett Packard Co.*, 941 F.2d 864, 870-71 (9th Cir. 1991) . Even if, *arguendo*, this allegation were proven and were indicative of a bias on Judge George's part, the case was transferred to, and all pending matters decided *de novo* by, Judge Hagen.

none of them apply here. To the extent plaintiff moves for disqualification pursuant to §455 (b), that motion is denied.

Defendant's Motion For Summary Judgment

The Ninth Circuit affirmed this court's prior grant of summary judgment on plaintiff's emotional distress and breach of contract claims, and, holding there is a genuine issue of fact on the issue of damages, reversed and remanded the summary judgment on the malpractice claims. Remaining are plaintiff's first, third, fourth, fifth and sixth claims.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The plain language of FRCP 56(c) requires the entry of summary judgment after adequate time for discovery, against a party who fails to make a sufficient showing to establish the existence of an essential element of proof at the time of trial. *Id.,* 323.

Defendant moves for summary judgment on the ground that in malpractice cases, expert testimony on an attorney's duty of care is required under state law, and plaintiff has not identified any expert or submitted any expert testimony on this issue.

Plaintiff, in opposition, cites out-of-state authority for the proposition that expert testimony is not required in attorney malpractice cases. He fails, however, to adequately distinguish recent Nevada Supreme Court authority directly on point. In *Allyn v. McDonald,* 112 Nev., Adv. Op. 11, p.3 (1996), the court stated a general rule that expert testimony is required in attorney malpractice cases. The *Allyn* court announced a *per se* rule of state substantive law, and this

court is not free to disregard it. *See Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938)

The rule in *Allyn*, requiring expert testimony to establish a breach of the standard of care owed by attorney to the client unless the attorney's conduct is so "obviously and flagrantly substandard as to render expert testimony superfluous and burdensome," is the majority approach. ABA/BNA Lawyer's Manual on Professional Conduct, 301:126 Even in a bench trial, where the factfinder is arguably knowledgeable about standards of conduct in the legal profession, it is inappropriate to rely on the judge's own personal experience as an attorney as a substitute for actual evidence on the applicable standard of care for attorneys. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Circ. 1979). There are three reasons for the extension of the rule to bench trials.

> First, although the judge may be competent to evaluate defendant's conduct in light of the relevant standard of care, the actual standard of care itself is a question of fact that is best left to the presentation of evidence with the opportunity for cross-examination and rebuttal. Second, ... [the trial judge's personal knowledge is a subjective standard; reliance on it] would effectively change a question of factfinding into one of discretion and require appellate courts to undertake the unwanted task of evaluating the trial judge's personal knowledge. Finally, ... [it is undesirable] to unnecessarily establish a different substantive requirement for bench trials than for jury trials. *Lentino*, 481.

Although plaintiff argues strenuously that this case falls within the exception to the rule because the breach of care is so obvious that it may be determined by the court as a matter of law or is within the ordinary knowledge of laypersons, he

offers no evidence or argument which persuades this court that expert testimony may be dispensed with. In *Allyn*, the court was able to dispense with expert testimony because the only issue was the factual issue as to whether the attorney had allowed the statute of limitations to run. *Allyn*, 4. The court expressly found that the statute of limitations was clear and unambiguous, and the accrual date of the claim was not subject to question or interpretation. The court cautioned, however, "if the applicability of the statute at issue was uncertain, if significant questions regarding the accrual date existed, or if issues regarding the tolling of the statute existed", expert testimony might be required. *Id.* Here, far from being so obvious that it may be determined by the court on its own as a matter of law, plaintiff's theory of legal malpractice is replete with legally arguable contentions[3]. Therefore, this case does not fall within the exception to the rule.

In order to prevail in a legal malpractice action, plaintiff must prove the following elements by a preponderance of the evidence: (1) an attorney-client relationship; (2) duty of care on the part of the attorney; (3) breach of the attorney's duty; (4) causing damage to the client. *Semenza v. Nevada Medical Liability Insurance Company*, 104 Nev. 666, 667-68 (1988). Because plaintiff would be required to submit expert testimony to establish these elements at trial, he must do so now in order to create a genuine issue of material fact in opposition to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S> 242, 250 (1986). Plaintiff was on notice that defendant relied on the rule requiring expert

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[3] As discussed in this opinion, plaintiff fails to create a genuine issue of material fact regarding Gentile's breach of professional duty. The court does not here mean to suggest that the referenced legally arguable contentions create such an issue. In the absence of expert testimony, they do not.

testimony in moving for summary judgment, and had ample time to retain an expert. By failing to submit an affidavit of an expert on the attorney's duty of care and whether defendant breached that standard, as required by state law, plaintiff has failed to show he has sufficient evidence to establish the second and third elements of the tort. This failure of proof renders any issue as to the existence and amount of damages suffered by plaintiff immaterial. Therefore, there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

To the extent that plaintiff argues a different rule should apply to him as a *pro se* litigant, the court disagrees. Plaintiff cannot dispense with the requirement of expert testimony by asking deposition questions of percipient witnesses who happen to be attorneys, nor can he be permitted to function as his own expert witness via arguments made in his legal briefs. Furthermore, any argument that the reluctance of any percipient witnesses to provide, in a deposition, a negative evaluation of defendant's representation of plaintiff establishes that it is impossible to retain a legal expert in the area of legal malpractice is absurd.

In addition, any argument that a breach of a rule of professional conduct may be substituted for expert testimony on the breach of standard of care under a theory of negligence *per se* must fail as well. In general, such rules only purport to state minimum level of professional conduct for attorneys, and are inappropriate as a standard for defining proper civil conduct. *Hizey v. Carpenter*, 830 P.2d 646, 650 (Wash. 1992). The disciplinary rules governing the bar are intended not only for the protection of the consumer but for the bench and the bar as well. ABA/BNA Lawyer's Manual on Professional Conduct, 301:128. A breach of a disciplinary rule or other rule of court not directly intended for the benefit of the public doesn't establish a breach of a duty owed to a client. *Id.* While in appropriate cases, violation of rules of

conduct may be admissible evidence of legal malpractice, they are not sufficient to meet a malpractice plaintiff's burden of proof. Where, as here, a defendant attorney has moved for summary judgment based on the lack of evidence of breach of duty, plaintiff must oppose with sufficient evidence to create a genuine issue of material fact. Plaintiff has not proved that any rules of conduct were violated and has not submitted expert testimony on the breach of any professional duty. Plaintiff has not met his burden. Defendant's motion for summary judgment is hereby granted.

IT IS ORDERED that plaintiff's motion (#68) for reconsideration of the court's order denying a jury trial is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion (#68) for disqualification is DENIED.

IT IS FURTHER ORDERED that defendant's motion (#58) for summary judgment is GRANTED. The Clerk shall enter judgment accordingly.

DATED: This day 10th of February, 1997.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID ALAN PETERSON,

JUDGMENT IN A
CIVIL CASE

Plaintiff,

v.

CV-S-93-1037-DWH (RLH)

DOMINIC P. GENTILE,
Defendants. /

_____**Jury Verdict.** This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X____**Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendants' Motion to for Summary Judgment is granted. Judgment is entered in favor of Defendant's and against Plaintiff.

February 19, 1997
Date

LANCE S. WILSON
Clerk

/s/
(BY) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID ALAN PETERSON, CV-S-93 -1037-DWH (RLH)

Plaintiff,

vs.

MEMORANDUM DECISION AND ORDER

DOMINIC P. GENTILE, ESQ., et al.,

Defendants.

_____/

Before the court is plaintiff's motion (#79) for reconsideration of the court's order (#71) granting summary judgment in favor of defendant. The motion is without merit. For all the reasons set forth in defendant's opposition (#80) to plaintiff's motion, the motion is denied.

IT IS ORDERED that plaintiff's motion (#79) for reconsideration is DENIED.

DATED: This 23rd day of May, 1997

/s/
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ALAN PETERSON,	)	No. 97-15424
	)	
Plaintiff-Appellant,	)	
	)	D.C. No.
v.	)	CV-93-01037-DWH/RLH
	)	
DOMINIC P. GENTILE, and his marital community and the Law Firm of Gentile, Porter & Kelesis; JOHN DOE, unknown and unnamed Legal Malpractice Insurer,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted November 4, 1997**

Before: HUG, Chief Judge, PREGERSON, and BEEZER, Circuit Judges.

David Alan Peterson appeals pro se the district court's summary judgment for his former civil rights attorney in Peterson's diversity action alleging legal malpractice.[1]

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[1] In prior appeal 95-17026, this court reversed in part summary

We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment de novo, see Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and we affirm.

Because Peterson presented no basis for questioning the impartiality of the district court judge, the judge did not abuse his discretion by denying Peterson's motion for disqualification under 28 U.S.C. § 455(a) or (b) (1993). See Moideen v. Gillespie, 55 F.3d 1478, 1482 (9th Cir. 1995)

Because Peterson failed to present expert testimony to establish breach of the duty of care, and the alleged breach was not obvious, Peterson failed to raise a genuine issue of material fact as to legal malpractice. See Allyn v. McDonald, 910 P.2d 263, 266 (Nev. 1996) (per curiam) (establishing that expert testimony is required in legal malpractice action unless breach is obvious). Accordingly, the district court properly granted summary judgment for defendants.[2] See Bagdadi, 84 F.3d at 1197.

AFFIRMED.

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judgment for defendants on the ground that Peterson raised a genuine issue of material fact regarding damages. On remand, the district court granted summary judgment for defendants on the issue of liability, which had not been considered previously by either the district court or this court.

[2] Because we affirm summary judgment, we do not reach Peterson's contention that the district court abused its discretion by denying his untimely jury demand, initially and upon reconsideration. We have considered Peterson's remaining contentions and find that they are without merit.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ALAN PETERSON,	)	No. 97-15424
	)	
Plaintiff-Appellant,	)	
	)	D.C. No.
v.	)	CV-93-01037-DWH
	)	Nevada (Las Vegas)
DOMINIC P. GENTILE, and	)	
his marital community and	)	ORDER
the Law Firm of Gentile,	)	
Porter & Kelesis; JOHN DOE,	)	
unknown and unnamed Legal	)	
Malpractice Insurer,	)	
	)	
Defendant-Appellees.	)	

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Chief Judge Hug and Judge Pregerson have voted to reject the suggestion for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[FILED MARCH 18, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

David Alan Peterson

Plaintiff Appellee

vs.

No. 97-15424

Dominic P. Gentile and His Marital Community and the Law Firm of Gentile, Porter and Kelesis. Doe, John, unknown and unnamed Legal Malpractice Insurer(s) aka The Home Insurance Company

Plaintiff Appellees' Petition for Re Hearing

Plaintiff-appellee hereby submits his petition for rehearing in accordance with Fed. R. App. P. 40.

I. Statement of Plaintiff-Appellee

It is the plaintiff's judgement that material points of law and facts were overlooked in the Court's decision to affirm defendants Summary Judgment Motion. As such plaintiff-appellee submits this petition for rehearing with a suggestion of the appropriateness for rehearing en banc.

II. Statement of Issues Presenting for Rehearing

1. Did the Court err in finding that the alleged breach by the defendant was not obvious after the plaintiff has presented proof that the defendant, after accepting a twenty thousand dollar retainer and representing the

plaintiff for over two years withdrew three weeks prior to trial, writing a false and inflammatory letter to this Magistrate Judge accusing his client of everything from withholding evidence to being mentally ill, when in fact he withdrew because of a conflict of interest that included his taking five checks, each in the amount of seventy five hundred dollars from opposition counsel to compromise his client's interests.

2. Did the District Court err in granting his summary judgement based solely on the Allyn v. McDonald 910 P2d 263 112 Ved Sup. Ct. #68, a new law, without first alerting the Plaintiff to the need for counter-affidavits?
3. Did the District Court err and seriously compromise and prejudice plaintiff's ability to properly prepare and respond in an appeal when it put into its summary judgement decision two completely unrelated motions title clearly as appeals to the Ninth Circuit Court of Appeals forcing plaintiff to respond to three arguments instead of the one issue defendant's counsel had raised that of expert testimony, and did their insertion give defendant's counsel unfair advantage.

III. Standards for Rehearing

Fed. R. App. 40 provides that a petition for rehearing may be filed within 14 days after entry of Judgement. The petition for rehearing must state the points of law and facts which in the opinion of petitioner the Court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present.

IV. Statement of the Case

The appellee originally filed this action on 10/21/1993. On 9/18/95 the District Court granted Summary Judgement on

the issue of damages, and applicable standard of care. The Plaintiff appealed this decision and the Ninth Circuit Court reversed defendants Motion on the issue of damages. Defendants counsel filed a petition for rehearing on the issues of expert testimony and damages. The court found their arguments unconvincing. The Defendants o filed a second motion for Summary Judgement on November 20th 1996 on March 3, 1997 the Court granted second Summary Judgement Motion on the issue of expert testimony on March 3, 1997 the Plaintiff filed an appeal to the Ninth Circuit Court of Appeals.

On November 6, 1997 the Court affirmed defendant's Motion for Summary Judgement.

V. Issues for Rehearing

1. **Did the Court err in finding that the alleged breach by the defendant was not obvious after the plaintiff has presented proof that the defendant, after accepting a twenty thousand dollar retainer and representing the plaintiff for over two years withdrew three weeks prior to trial, writing a false and inflammatory letter to this Magistrate Judge accusing his client of everything from withholding evidence to being mentally ill, when in fact he withdrew because of a conflict of interest that included his taking five checks, each in the amount of seventy five hundred dollars from opposition counsel to compromise his client's interests.**

   Was the District Court's assertion that the defendant's breach of care was not obvious, too vague in light of the relevant facts of this case? The plaintiff contends that the facts of this case clearly follow the Allyn v McDonald ruling by the Nevada Supreme Court in that the breach of care is obvious.

The Defendant in this case in writing a false and inflammatory letter to the Magistrate Judge outlining a series of false accusations against the client he was then representing, is a breach of the standard of care. When the plaintiff collects evidence including eleven depositions and a tape to prove to a certainty that line for line that letter was false that breach is obvious.

The defendant in this case admitted that he had a conflict of interest (See Plaintiff 1). The plaintiff had presented evidence to a certainty that the defendant accepted a seventy five hundred dollar check from opposition counsel shortly before his withdrawal, the plaintiff has proof this check was one of five checks each in the amount of seventy five hundred dollars the defendant accepted from opposition counsel to compromise his client's interests. As both the defendant and opposition counsel admit that at least seventy five hundred dollars was given to the defendants three member firm shortly before trial, and opposition counsel's explanation for the transfer of funds was that after a three state search (Plaintiff 2) one of the other two partners of the defendants law firm was the most qualified to handle this tax matter, in spite of the fact that this "tax expert" at the time this deposition was taken was advertising his practice in the phone book as a personally injury attorney specializing in auto accident, divorce, child custody, and dog bites, with no mention of tax expertise, a reasonable person, a lay person could find the defendants breach of care obvious.

The Ninth Circuit Court of Appeals on its own motion on Dec. 19, 1996 stated:

"The Court on its own motion recalls the mandate issued on October 9th 1996 by deleting the last sentence of paragraph three which reads:

Assuming Gentile liability as did the District Court we reverse the District Court's summary judgement on this issue because there is a genuine issue of materials fact as to the amount of damages. *See id.*" and replacing it with the following:

Assuming Gentile's liability as did the District Court, we reverse the District Court's Summary Judgement on this issue. *See id.* Peterson has presented evidence sufficient to raise a genuine issue of material fact as to the amount of damages. That evidence includes a letter from Gentile to defendant's attorney valuing the case at $6,608,700.00 and demanding a settlement of $1,000,000.00. Gentile's statement in his motion to withdraw that Peterson had suffered $125,000 in damages and another attorney's estimate of recovery with a high end of $100,000.

The Plaintiff came forward with the defendants own admission that he had mishandled discovery failing to take depositions and collect evidence, this admission made at both his deposition and in the presence of an already deposed witness. This evidence was bolstered by his own legal assistant on tape, who stated:

"Well, yeah, because the Judge is going to say you had discovery whereas Potter (another attorney) can say I didn't have it and I'm going to go in a different direction so where Potter would have an excuse for not getting discovery in that he wasn't on the case Dominic (the defendant) would have no excuse."

The defendant further committed malpractice in not obtaining available medical records necessary to substantiate plaintiff's claims. The defendant allowed the statute of limitations with regard to the keeping of these

records to lapse, further damaging Plaintiff's then and now claims.

The Plaintiff asserts that this evidence is all obvious and could easily be understood by a layperson although there is an abundant amount of evidence for a layperson to consider, this case is simply a particularly egregious incident of garden variety malpractice. The defendant lied to his client, he lied to the Court, he was negligent in performing his duties, and he compromised his clients interests in taking $37,500 from opposition counsel and withdrawing in panic when he learned his client (now plaintiff) had learned of his deceit.

The Defendant's counsel's failure to confront the three core issues of this case. (1) That the defendant admitted he had a conflict of interest (2) that he lied to his client and the court in order to extricate himself from this conflict of interest (3) that he took $37,500.00 in monies from opposition counsel to compromise his client's interests they fail to outline which of his lies or admissions requires expert testimony.

In Carter v Stanton 405 U.S. 669, 92 S Ct 1232 31 L ED. 2d Seq (1972) the Court vacated Summary Judgement and remanded for further development in light of an inadequate record. The Court held that the District Court's order was opaque and unilluminating as to the relevant facts or the law with respect to the merits of Appellate's claim. In the position of the case we are unconvinced that Summary Judgement was properly entered.

In light of the simple and eminently provable evidence submitted the Plaintiff would assert that the Court erred in ruling that the evidence was not obvious and that the Plaintiff deserves a rehearing on the issues.

In Sankovich Life Ins. Co. of N.Am. 638 f 2d 136 (9th Cir 1981) 56.15 stated that a case is not suitable for

Summary Judgement when there are undisputed facts from which different inferences might be drawn and as to which reasonable minds might differ.

An Appellate Court will do likewise in reviewing the trial court's granting of Summary Judgement.

Clearly on the issue before this Court - whether the evidence is obvious or not obvious is a situation where different inferences might be drawn and a to which reasonable mind might differ making this case not suitable for Summary Judgement when there are undisputed facts.

2. **Did the District Court err in granting his summary judgement based solely on the Allyn v. McDonald 910 P2d 263 112 Ved Sup. Ct. #68, a new law, without first alerting the Plaintiff to the need for counter-affidavits?**

In Yusaf Asad Madyan v Thompson 657 2d 868 (7th Cir 1981) Summary Judgement was granted for defendants when pro se prisoner plaintiffs failed to file opposing affidavits as requested by rule 56(e). Reversing the Court of Appeals held that the District Court erred in granting the motion without first alerting Plaintiffs to the need for counter-affidavits adequate knowledge of the right and necessity of filing counter-affidavits under rule 56 (e) were radical to the pro se litigants access to a just deposition on the merits.

The District Court in its Summary Judgement decision stated

"He (plaintiff) fails, however, to adequately distinguish recent Nevada Supreme Court Authority directly on point. In Allyn v McDonald 112 Nev Adv. op. 11, P3 (1996) the Court stated a general rule that

expert testimony is required in attorney malpractice cases."

As the District Court did not first alert the Plaintiff of the new requirement for expert testimony or counter affidavits prior to his granting of Summary Judgement or at any other time in this litigation the Plaintiff was unaware of this need, and believes the Court should have given him a reasonable instruction and that in not doing so the court erred.

The defendants have at every occasion argued that it was too late for Plaintiff to depose expert witnesses as discovery had closed. From Defendant counsel:

"Discovery cut-off in this case was September 16th, 1994. That it is too late for Peterson to designation an expert witness.

The Plaintiff has at all times wanted to resolve this issue but absent any instruction or direction from the Court he was under the impression the defendants arguments were correct. The Plaintiff believes that the Court in citing new law should accompany with it new instruction especially as it pertains to a pro se litigant.

The Plaintiff conducted eleven depositions during the discovery period in order to verify and substantiate each of his claims. The Plaintiff would have readily availed himself of the opportunity to depose expert testimony had he known or been advised that option existed. The Plaintiff asks the Court here to grant a rehearing of this motion so he may comply with the recent Nevada law by deposing an expert witness.

The plaintiff although he collected evidence and conducted deposition that clearly showed that the defendant had seriously compromised his interest at no time during the discovery process was he advised nor did he have knowledge of the need for expert testimony in legal malpractice action, the plaintiff consulted Moore's

Federal Practice Rules in order to find how he had erred only to find no mention of this rule in the Federal Rules of Civil Proceeding. The defendants in this case are using this rule as a club and a shield, to club the legitimate grievance of the plaintiff while at the same time shielding their client from legitimate prosecution by using this rule as an escape hatch for their otherwise hopeless guilty defendant. The plaintiff submits that the court should not allow this to happen to any pro-se litigant who in good faith bring a legitimate complaint against an attorney only to find the doors of justice barred through the abuse of this rule.

A party (in this case the Plaintiff) is entitled pursuant to Rule 56(f) to set forth in an affidavit the reasons why he is presently unable to present by affidavit meeting the requirements of Rule 56(e) 56.22 facts essential to justify his opposition. In this event the Court has a broad discretion to determine whether the reasons are adequate and if so whether they deny the Motion for Summary Judgment order a continuance or make such other order as is just Costello, Porter, Hill, Heisterkamp & Bushnell v Providers Fidelity Life Ins Co. 958 f 2d 836 (8th Cir 1992. (Information needed by the defendant to support its argument in opposition to Summary Judgement was in the sole possession of the Plaintiff, the relative availability of evidence to the parties is a factor to be considered on Motion for Summary Judgment and the party opposing Summary Judgment is to be afforded a reasonable opportunity to conduct discovery so that it may present favorable affirmative evidence. The failure to allow the defendant that opportunity required reversal. See also Jarvis v Nobel/Sysco Food Serv Co. 985 f 2d 1419 (10th Cir 1993).

Where the intervening defendant stated in Rule 56(f) affidavit that this information could only be obtained

through the requested discovery the Court of Appeals remanded directive the District Court to give the intervening defendant a reasonable opportunity to conduct discovery.

A Pro-Se Plaintiff having met all the requirements of evidence, and having established a genuine issue of material of fact, that of damages, should be given a reasonably opportunity to conduct discovery and obtain and depose the testimony of an expert witness by the District Court.

The plaintiff who should not be presumed to know the law on such a technical issue as this should have been advised of this opportunity by the Court, rather than the Court allow the defendants to continually argue in their briefs that he did not have this opportunity.

As one could interpret here the information needed by plaintiff was in the sole possession of the defendants and the Court, they having the knowledge of the law, and as the Plaintiff's case would proceed to Court if given a reasonable opportunity to conduct one discovery deposition of an expert witness the Plaintiff asks the Court to reverse its decision and allow this Plaintiff a reasonable opportunity to conduct this now needed discovery.

3. **Did the District Court err and seriously compromise and prejudice plaintiff's ability to properly prepare and respond in an appeal when it put into its summary judgement decision two completely unrelated motions title clearly as appeals to the Ninth Circuit Court of Appeals forcing plaintiff to respond to three arguments instead of the one issue defendant's counsel had raised that of expert testimony, and did their insertion give defendant's counsel unfair advantage.**

On January 19th Plaintiff sent a Motion to the Clerk of Courts in Nevada titled to the Ninth Circuit Court of Appeals with an attached note requesting that the Clerk forward this Motion (requesting a Jury Trial) to the Ninth Circuit Court of Appeals. For reasons unknown to the plaintiff the Clerk not only did not forward the motion but it somehow ended up in the chambers of the judge whose ruling the Plaintiff was appealing. The Judge held this Motion further by "construing" plaintiff's motion as a Motion for Reconsideration also a Motion for Disqualifications and inserted these two unrelated Motions into his Summary Judgement. This is prejudicial error.

The District Court in co-mingling motions clearly sent by Plaintiff to the Ninth Circuit Court of Appeals with its Summary Judgement decision seriously compromised the Plaintiff's ability to properly prepare an appeal. As the Plaintiff now had to answer two unrelated issues to the Summary Judgement, his efforts had to be split by three issues instead of the one. Also by inserting these two unrelated motions the Plaintiff believes gave the Judge's Summary Judgement decision the appearance the plaintiff was disorganized but more importantly accusatory as to the Judge's conduct, prejudicing anyone who read these documents.

Faced with three issues instead of one the Plaintiff became confused and unable to present properly the one argument of the case that of expert testimony. As the Plaintiff had already survived the issue of expert testimony presented to the Ninth Circuit Court of Appeals by Defendants on two prior occasions, he mistakenly thought a third time would produce the same result, Plaintiff then did not concentrate his efforts fully

on what should have been the one issue at hand expert testimony.

More importantly it allowed defendant's counsel to argue three issues instead of the one at hand. These two unrelated issues placed in front of the issue of expert testimony, the issue of Jury Trial and the highly inflammatory issue of disqualification of Judges, issues the defendants could easily win, changed the entire complexion of the appeal.

If the defendant's counsel were not allowed to argue these two unrelated issues and instead was forced to justify only the need for expert testimony in this case the Plaintiff feels their argument would have been found unconvincing. The Defendants allocated the first thirty pages of their brief on these two unrelated issues, hiding behind these two unrelated issues to paint a dismal picture of the plaintiff, bolstered by self-serving rhetoric that had nothing to do with the issue at hand. By placing the issue of expert testimony last, allocating seven pages, the reader might easily have already formed an opinion prior to even reading what should have been the only argument in this appeal, expert testimony.

The insertion of these two unrelated motions into the Summary Judgement by the Judge is clearly not allowed under Rule 56 (c) - 56.11[10]

Although Rule 56(c) authorizes the consideration of a broad range of materials in a Summary Judgement decision the Court in Association for Reduction of Violence v Hall 734 F 2d 63 (1st Cir 1984) citing **treatise**, held that material that is not admissible or otherwise usable at trial cannot be considered on a Motion for Summary Judgement.

IV. Conclusion and Request for Relief

In this case the court is confronted with a particularly egregious instance of malpractice by an attorney under its jurisdiction. This attorney's sole defense is to hide behind the shield of expert testimony stating the evidence is not obvious.

The question of whether the evidence presented in this case is obvious or not obvious is not a black and white issue. It is an issue from which different inferences must be drawn and as to which reasonable minds might differ. When there are undisputed facts of the case (damages in this case) if the Court is to err it must by law and precedent err on the side of the non-moving party, the Plaintiff on this issue.

The Court must allow that once the defendant's counsel had twice argued the issue of expert testimony, including the Allyn v McDonald case in their petition for re-hearing, their arguments found unconvincing, a Pro-Se plaintiff absent any instruction or direction from the Court could have a reasonable expectation of his prevailing a third time on this issue.

Once the District Court after over three years of litigation, decides that a recent decision by the Nevada Supreme Court necessitates expert testimony in legal malpractice cases, in spite of the fact that this case (a case of first impression) ruled that expert testimony in that case was not required, the Court had an obligation to notify the pro-se plaintiff that he now needed expert testimony and allow the Pro-Se plaintiff a reasonable opportunity under Rule 56(f) to depose an expert and comply with the new ruling prior to his Summary Judgment ruling. To surpass a Pro-Se litigant with a negative Summary Judgment without first advising him as to his rights denies the litigant the right to a fair

hearing. (This issue might be suitable for an en Banc review). This failure by the District Court requires reversal by this Court.

This District Court erred twice in its handling of Plaintiff's Motion addressed and titled to the Ninth Circuit Court of Appeals, that was sent by the plaintiff to the District Clerk of Courts with a note attached to forward it to the Ninth Circuit Court of Appeals.

In holding the Motion and not forwarding it to the Ninth Circuit Court, the Court interfered unfairly with this Plaintiff's right to appeal that Court's decision with regard to a jury trial. The greater err was to include these two unrelated motions in its Summary Judgment decision, contaminating the Summary Judgment process confusing both the issues and the Pro-Se plaintiff. It is the Plaintiff's contention that if the Court of Appeals had only to deal with the Allyn v McDonald case the issue of expert testimony, and plaintiff had been allowed to argue its relationship to other important cases which were compatible with the Allyn v McDonald case, cases that did not require expert testimony, he would have prevailed a third time before the Court on this issue. By inserting two unrelated motions into the Summary Judgment decision, the scenario was set where the plaintiff could only self destruct. The inequality of this action should be seen by the Court to be reversible err.

Two things are clear in this case, the defendant committed egregious malpractice and the plaintiff's has not received a fair and impartial hearing on the matter.

The Court must not ignore the serious issue of misconduct by an attorney, and support this misconduct by further abusing of the Rule of expert testimony, the Court must give the Pro-Se plaintiff a reasonable opportunity to meet this requirement under Rule 56(f) by

allowing the Plaintiff to depose an expert witness created by new law in Nevada.

In the interests of the issues, of fairness, and of justice, the plaintiff asks the Court to allow a fair re-hearing of this matter, and reverse this decision allowing the plaintiff a reasonable opportunity to comply with this new requirement.

In light of the fact that there are still unresolved issues in this case the pro-se plaintiff asks that his error not to be found fatal to the case, but finding that allowing the plaintiff to correct this technicality is the most reasonable and just decision.

Dated this 20th Day of November 1997

/s/

By David Peterson Plaintiff
Pro-Se
1408 Fairway St.
Eau Claire, WI 54701

Certificate of Mailing

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that service of the foregoing PLAINTIFF APPELLEE'S PETITION FOR REHEARING was made this date by depositing a true copy of the same mailing, first class, postage prepaid at Las Vegas, Nevada, addressed to the following:

THOMAS F. KUMMER
LYSSA M. SIMONELLI
Seventh Floor, 3800 Howard Hughes Parkway
Las Vegas, Nevada 89109
Attorney for Defendants

DATED this 20th day of November, 1997

/s/
Signature

Transcript pages 77-80 Plaintiff 1

THE WITNESS: You know what I do - my —
MR. KUMMER He recalls having talked to him about something, but my question was going to be, or comment was, I don't think he's answered that he did represent him.
THE WITNESS: No.
MR. KUMMER: On any occasion.
MR. PETERSON: He might —
THE WITNESS: I might have.
MR. KUMMER: He might have talked to him about potentially doing it. That's the answer that he gave.
MR. PETERSON: Okay. Which does not reasonably conclude that he did in fact represent him on something.
THE WITNESS: Yeah. I don't —
MR. KUMMER: They discussed it.
THE WITNESS: I don't remember actually doing a representation. I have a vague memory of Walter asking me to, and I don't remember what it was about, and it was the — Oh. Wait a minute. Hold on. Boy, am I glad we stayed with this.

I never represented Rawlings, Olson & Cannon, but my law firm did, and it was George Kelesis that was doing the representation, and when I found out about it, I disclosed it to you immediately.

And it had nothing to do with our lawsuit.
Q: (By Mr. Peterson) Okay. Now that you recall George Kelesis or Kelesis's involvement, do you recall what he was handling for Rawlings?
A: I absolutely do, and I'm not going to tell you because I think it's —
MR. KUMMER: Privileged.
THE WITNESS: Privileged.
MR. PETERSON: Privileged information. Okay.

Q: (By Mr. Peterson) So therefore it wouldn't be unusual for your firm to receive checks from Cannon Rawlings & Olson?
A: We receive checks from their trust account all the time. We litigate against them all the time. And when we settle lawsuits, they send us a check.
Q: Mm-hmm.
A: But we also receive — I think we must have gotten paid for what George did.

In fact, you knew - I don't see it on here.

All right.
Q: So you said you received checks from Cannon Rawlings & Olson all the time?
A: My partner —
MR. KUMMER: And the witness qualified that.
THE WITNESS: Okay.
MR. KUMMER: He litigates against clients of Rawlings Olson & Cannon all the time as a result of the fact that usually Rawlings Olson & Cannon is representing a defendant who ultimately has to pay money. They get checks from Rawlings Olson & Cannon's office, usually through their trust account. That was his testimony.
THE WITNESS: It's not Rawlings Olson & Cannon's money. It's the money of the insurance company or the defendant that Rawlings Olson & Cannon represents, but we get checks from their trust account. You know, I say I'm sure, because I know I've received several over the years.
And I know that my partner, Gene Porter has a predominantly — Most of what he does is personal injury work for plaintiffs, and I know that he works cases against every insurance defense firm in this town, and Rawlings Olson & Cannon is one of the more prominent ones.
MR. PETERSON: I'd like stop and ask here that any checks you received from Cannon Rawlings & Olson be produced.
MR. KUMMER: We're not going to produce them.
MR. PETERSON: Okay.

MR. KUMMER: So if you want to do a request or file a motion or whatever —
MR. PETERSON: Okay.
MR. KUMWER: — that's fine. But we are not going to produce those.
MR. PETERSON: Okay.
THE WITNESS: I'm glad you said it.
MR. KUMMER: Just a minute.
THE WITNESS: I'm sorry. Slow down.
Q: (By Mr. Peterson) To the best of your recollection, did any checks come into the office, into your firm, during the time you represented me, from Cannon, Rawlings & Olson?
MR. KUMMER: In what capacity? Through defendants that they were representing?
MR. PETERSON: Any checks, any checks at all.
THE WITNESS: I don't know. I really don't know.
MR. KUMMEP: That's fine. Just let it go.
That's your answer.
MR. PETERSON: Okay.
Q: (By Mr. Peterson) That's a may. It isn't a yes or a no then?
MR. KUMMER: Maybe, maybe not.
MR. PETERSON: Okay
MR. KUMMER: We're not going to produce them.
MR. PETERSON: Okay.
MR. KUMMER: So maybe it doesn't matter.
MR. PETERSON: Okay.
THE WITNESS: I'll tell you, I can answer one...

* * *

Plaintiff 2

And we consulted with a lawyer in Los Angeles, another one in Phoenix, and two or three lawyers locally in Las Vegas. And after asking around, we were informed that Mr. Kelesis was probably one of the best local lawyers from a tax standpoint that we could find, and as a consequence, we contacted Mr. Kelesis to have an initial interview with him and see what he thought and what we could do.

Q When you went to talk to Mr. Kelesis initially, did you have some concern about the personal information that you would have to reveal in order to have these matters taken care of?

A Very much so. When I went and saw Mr. Kelesis, he was with Dominic Gentile's law firm, and I believe at the time Gene Porter was also in the law firm. I have known Gene for a number of years, and I have litigated against Dominic for up to -- since 1980, roughly, when he came to town. And I was very reluctant to allow personal information of mine in a situation where either Dominic or Gene would have information coming to them.

Frankly, I just didn't feel it was any of their business, and it was personal to myself and my wife, and we didn't want it spread around. And I articulated that to Mr. Kelesis at our first meeting. I told him specifically my only reservation in coming to you is Dominic and Gene are your partners, and I don't want them to be aware of this case...

* * *